104

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No. 08-7

IN THE
SUPREME COURT OF THE UNITED STATES

ROCKY H. CAIN

Petitioner,

v.

TRANSOCEAN OFFSHORE USA, INC.
AND SEDCO FOREX CORP.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Hal C. Welch (La. Bar 13344)
Counsel of Record
Jason A. Schoenfeld (La. Bar 25242)
Lemle & Kelleher, L.L.P.
Pan-American Life Center
601 Poydras Street, 21st Floor
New Orleans, Louisiana 70130-6097
(504) 586-1241
Counsel for Respondents, Transocean Offshore USA, Inc., and Sedco Forex Corp.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

BRIEF OF RESPONDENTS IN OPPOSITION 1

QUESTIONS PRESENTED FOR REVIEW 1

REASONS FOR DENYING THE PETITION 2

I. There is no split between the Eleventh and Fifth Circuit regarding the status of structures that are under construction and not yet vessels.....2

II. *Stewart* did not upset or overrule the extensive jurisprudence concerning the construction of vessels recognized by the Fifth and Eleventh Circuits.....11

CONCLUSION.....15

TABLE OF AUTHORITIES

CASES **PAGE**

Bouvier v. Krenz, 702 F.2d 89 (5th Cir. 1983).....9

Bunge Corp. v. Freeport Marine Repair, Inc., 240 F.3d 919 (11th Cir. 2001).....2, 4, 7, 8, 9

Burns v. Anchor-Wate Co., 469 F.2d 730 (5th Cir. 1972).....9

Cain v. Transocean Offshore U.S.A., Inc., 518 F.3d 295 (5th Cir. 2008).....1, 4

Caruso v. Sterling Yacht & Shipbuilders, Inc., 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).....2, 5, 9, 10

Crawford v. Electric Boat Corporation, 515 F.Supp.2d 282 (D. Conn. 2007).....10

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995).....12, 13

Harbor Tug and Barge Company v. Papai, 520 U.S. 548 (1997).....13

Hyman v. Transocean Offshore U.S.A., Inc., 207 Fed.Appx. 485 (5th Cir. 2006).....1, 3, 4

Mink v. Genmar Industries, Inc.,
29 F.3d 1543 (11th Cir. 1994).....2, 4, 6, 7, 8, 9

Miroyan v. U.S., 439 U.S. 1338 (1978).....5

Nicole v. Southstar Industrial Contractors,
2004 WL 936848 (E.D. La. 2004).....14

Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc., 788 F.2d 264
(5th Cir.), cert. denied, 107 S.Ct. 278 (1986).....6

Sikorski v. Halliburton Energy Services, Inc., 2005 WL 1574443 (E.D. La. 2005).....14

Smith v. Niklos Drilling Co., 841 F.2d 598
(5th Cir. 1988).....14

Stewart v. Dutra Construction Company,
543 U.S. 481 (2005).....2, 3, 11

The Louisiana, 70 (3 Wall.) U.S. 164 (1866).....7, 8

West v. Lamulle Construction Co., Inc.,
1998 WL 151428 (E.D. La. 1998).....14

Williams v. Avondale Shipyards, Inc.,
452 F.2d 955 (5th Cir. 1971).....4, 9

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit was correct in holding that a vessel under construction and which was not yet approved for its intended purpose, and could not legally perform its intended purpose until millions of dollars of work still needed to be completed, was not a vessel for Jones Act purposes.

2. Whether this Court should accept this case for review when no judge on the original panel and no judge of the entire Fifth Circuit voted for either panel rehearing or rehearing *en banc*.

3. Whether this Court should accept this case for review when the judgment is not final, as there are unresolved issues as noted by the Fifth Circuit in footnote two in its opinion, and considering that Transocean has a Motion for Summary Judgment currently pending before the district court regarding seaman and vessel status under the Jones Act.

4. Whether Petitioner has presented compelling evidence of a square and direct conflict between the circuits, where the Fifth Circuit's opinions in *Hyman v. Transocean Offshore U.S.A., Inc.*, and *Cain v. Transocean Offshore U.S.A., Inc.*, which both held that the CAJUN EXPRESS was not a vessel in navigation at the time of petitioner's injury, do not conflict with principles established by the Eleventh

Circuit in *Mink v. Genmar Industries, Inc.* or *Bunge Corp. v. Freeport Marine Repair, Inc.*, but rather are directly in line with the Eleventh Circuit's earlier decision of *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, which relied on well-established Fifth Circuit precedent in accepting the vessel in navigation requirement for vessel, and hence seaman status.

5. Whether Petitioner has presented compelling reasons for this Court to grant the Petition, where this Court's decision in *Stewart v. Dutra Construction Company* did not overrule or disrupt the longstanding and extensive jurisprudence concerning vessels under construction of the Fifth and Eleventh Circuits.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. There is no split between the Eleventh and Fifth Circuit regarding the status of structures that are under construction and not yet vessels.

Despite petitioner's argument to the contrary, Transocean respectfully submits that the Fifth Circuit's long-standing jurisprudence[1] denying vessel status to structures that are not yet complete or have not yet been put into navigation or made an

[1] See petitioner's list of cases from the Fifth Circuit in his Petition for Certiorari.

instrumentality of commerce, is alive and well after this Court's decision of *Stewart v. Dutra Construction Company*[2]. Indeed, in late 2006, the Fifth Circuit was asked to decide, in *Hyman v. Transocean Offshore U.S.A., Inc.*[3], whether the yet unfinished mobile offshore drilling unit CAJUN EXPRESS – the very same structure upon which petitioner worked and who was injured a month and a half before Mr. Hyman – was a vessel. The Fifth Circuit noted that: "Whether an uncompleted craft is a 'vessel in navigation' turns on 'whether the vessel has been placed in navigation for its intended purpose.'"[4] The Fifth Circuit went on to hold that:[5]

> Although [the CAJUN EXPRESS] was partially completed, it lacked certain vital equipment and could not operate as a "mobile offshore drilling unit." The CAJUN EXPRESS was not placed in navigation for its intended purposes until it had been fully constructed and had engaged in the actual drilling operations for which it was built. This did not occur until

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[2] 543 U.S. 481 (2005).

[3] 207 Fed. Appx. 485 (5th Cir. 2006).

[4] *Hyman*, 207 Fed. Appx. at 487.

[5] *Hyman* 207 Fed. Appx. at 487 (emphasis and explanatory commentary added).

> April of 2001, six months after Hyman's initial injury **[and eight months after petitioner's alleged injury in this case].** The CAJUN EXPRESS was thus not a "vessel in navigation" at the time of Hyman's injury.

When asked a second time in *Cain v. Transocean Offshore U.S.A., Inc.*[6] (the case now before this Court), whether the CAJUN EXPRESS was a vessel (this time for an incident involving petitioner that, again, occurred a month and a half before the CAJUN EXPRESS was held not to be a vessel in *Hyman*), the Fifth Circuit again correctly held in the negative, relying squarely on its prior jurisprudence that "an incomplete structure that 'is not yet an instrumentality of commerce'" cannot be a vessel[7], and that "a structure may not attain vessel status before it is ever put into 'navigation'".[8]

It is against this long-standing line of Fifth Circuit precedent that petitioner claims there to be an opposite position in the Eleventh Circuit. In support of his position, petitioner cites *Mink v. Genmar Industries, Inc.*[9], and *Bunge Corporation v.*

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[6] 518 F.3d 295 (5th Cir. 2008).

[7] *Cain* 518 F.3d at 301, citing and quoting *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971).

[8] *Cain*, 518 F.3d at 301.

[9] 29 F.3d 1543 (11th Cir. 1994).

Freeport Marine Repair, Inc.[10]; however, the facts and holdings of these two decisions are highly distinguishable from this case, as they involve already completed vessels or those already in navigation, and do not involve the question of uncompleted vessels or vessel status as it relates to the Jones Act. Most importantly, the Eleventh Circuit, in a similar case has followed the logic of the Fifth Circuit.[11]

In denying a petitioner's petition for certiorari alleging a conflict between circuits, this Court held, in *Miroyan v. U.S.*[12], that the petitioner must allege more than a difference of approach between the circuits, and that a "square or direct conflict" must exist in order to invoke the discretionary powers of review of this Court. It is respectfully submitted that petitioner has failed to satisfy his burden of showing a square or direct conflict between the decisions of the Fifth and Eleventh Circuits.

Moreover, Transocean respectfully submits that there is indeed no difference between the Fifth and Eleventh Circuit's positions, as the Eleventh Circuit, in *Caruso v. Sterling Yacht and Shipbuilders, Inc.*[13], recognized and followed the Fifth Circuit's holdings, a position that has not been

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[10] 240 F.3d 919 (11th Cir. 2001).

[11] Caruso v. Sterling Yacht and Shipbuilders, Inc., 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[12] 439 U.S. 1338 (1978).

[13] 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

overruled and remains the law of the Eleventh Circuit to this day.

For instance, in *Mink*, the plaintiff was injured during a pleasure ride on a speed boat in the Gulf of Mexico, and thereafter sued the manufacturer of the pleasure craft for products liability under state law. The Eleventh Circuit was faced with determining whether Florida state law or substantive maritime law applied to the plaintiff's claims for his injuries, as well as his products liability claim. The court held that admiralty jurisdiction applied to all claims, and ultimately that the plaintiff's claims were time barred by the three year maritime statute of limitations.

In dicta contained solely within a footnote, the Eleventh Circuit rejected the plaintiff's argument that the incident did not satisfy the situs requirement of the test for admiralty jurisdiction because the pleasure craft was not a completed vessel, and as such not "in navigation" for purposes of determining whether admiralty jurisdiction applied. In rejecting this contention, the court declined to apply the Fifth Circuit's decision in *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*[14], which held that vessels undergoing sea trials are not vessels in navigation for purposes of the Jones Act. The Eleventh Circuit discussed *Reynolds*, stating that it had no application because "no case located suggests that the 'completed vessel' analysis is appropriate to the facts of this case."[15] In

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[14] 788 F. 2d 264 (5th Cir.), cert. denied, 107 S.Ct. 278 (1986).
[15] *Mink*, 29 F. 3d at 1545, n. 3.

other words, the Fifth Circuit's jurisprudence had no place in the Eleventh Circuit's analysis in *Mink* because there was a working vessel (a functioning speed boat used in navigation and made an instrumentality of commerce) involved in the accident. The Eleventh Circuit merely declined to apply the "complete vessel" analysis to the facts; the court neither rejected the Fifth Circuit's analysis in substance nor held that it would not apply in other contexts.

Here, the difference is clear: petitioner was allegedly injured on board a structure that was intended to be used for offshore drilling, the CAJUN EXPRESS, and it was still under construction at the time of petitioner's alleged injury. Put simply, the CAJUN EXPRESS had not become a vessel because it had yet to be completed and could not undertake its intended purpose as a semi-submersible mobile offshore drilling unit. In contrast, the pleasure craft at issue in *Mink* was fully operational and was being used for its intended purpose and as an instrumentality of commerce at the time of the plaintiff's injury.

With regards to *Bunge*, that case involved a suit for recovery of damages sustained as a result of the defendant's vessel, Hull No. 40, coming unmoored and subsequently striking a grain-loading facility owned by the plaintiff during a hurricane. The central issue involved whether the *Louisiana* Rule applied to the plaintiff's claims shifting the

burden of proof onto the defendant.[16] The defendant argued that its Hull No. 40 was not a vessel, as it was not complete, and thus admiralty jurisdiction and the *Louisiana* Rule did not apply.

The Eleventh Circuit held that the district court had admiralty jurisdiction, *i.e.*, the status and situs test, and that the "incident bore a substantial relationship to traditional maritime activity."[17] The court held that because the "allision occurred in navigable waters due to the imperfect mooring of a nearly complete vessel," the incident satisfied the situs requirement of the nexus test, thus conferring admiralty jurisdiction.

Similar to *Mink*, the *Bunge* decision cited by petitioner does not create a square or direct conflict with the Fifth Circuit's jurisprudence concerning when a structure under construction becomes a vessel. Unlike the plaintiff in *Bunge*, petitioner has alleged personal injuries under the Jones Act, not property damages or the implication of the *Louisiana* Rule or whether admiralty jurisdiction (at least from a status and situs perspective) applies. The Fifth Circuit in this case determined that the CAJUN EXPRESS did not constitute a vessel in navigation for the purposes of Jones Act seaman

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[16] The *Louisiana* Rule provides that "when a moving ship strikes and damages a stationary object, it is presumed that the moving ship is at fault." *Bunge*, 240 F. 3d at 923 citing *The Louisiana*, 70 (3 Wall.) U.S. 164, 173 (1866). This rule is also known as the *Oregon* Rule.

[17] *Bunge*, 240 F. 3d at 925.

status, not for the purposes of determining overall application of admiralty jurisdiction as in *Bunge*.

Setting *Mink* and *Bunge* aside, the fallacy of petitioner's circuit split argument is evidenced by the Eleventh Circuit's decision in *Caruso v. Sterling Yacht and Shipbuilders, Inc.*[18], in which the court held that a vessel under construction was not a "vessel in navigation". There, plaintiff, a cook hired to work aboard a newly constructed vessel, was injured aboard the structure while it was still being completed. The structure was not licensed at the time of plaintiff's injury, and it had not been put into commerce.

The Eleventh Circuit, in examining the vessel status issue, stated: "Our decision is predicated solely on the 'in navigation' requirement. To be 'in navigation,' a vessel must be 'engaged as an instrument of commerce and transportation on navigable waters.'"[19] In reaching its holding that the structure at issue was not a vessel, and hence the plaintiff was not a seaman, the Eleventh Circuit relied on no less than four cases from the Fifth Circuit[20] in support of its holding. The court also relied on cases from the Fourth Circuit to again point out that uncompleted vessels are not a part of

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[18] 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[19] *Caruso*, 828 F.2d at 15.

[20] *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5th Cir.), cert. denied, 107 S.Ct. 278 (1986); *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); and *Burns v. Anchor-Wate Co.*, 469 F.2d 730 (5th Cir. 1972).

commerce or navigation, two essential prerequisites for vessel status under the Fifth Circuit's jurisprudence.[21]

The *Caruso* decision is still the law of the Eleventh Circuit, and its holding is in no way challenged, distinguished or even commented upon by either the *Mink* or *Bunge* decisions.

In sum, petitioner has failed to establish a square or direct conflict between the decisions of the Fifth and Eleventh Circuits when it comes to the status of vessels under construction particularly in relation to Jones Act seaman status.[22] Accordingly, there is no reason for this Court to grant petitioner's request for review based on a split amongst the circuits. It should also be noted that no member of the original *Cain* panel, let alone any other judge within the entire Fifth Circuit, voted for either panel rehearing or rehearing *en banc*, evidencing no split amongst the judges within the Fifth Circuit itself. For both these reasons, the Petition for Certiorari should be denied.

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[21] *Caruso*, 828 F.2d at 16.

[22] Petitioner cites in a footnote the decision of *Crawford v. Electric Boat Corporation*, 515 F. Supp.2d 282 (D.Conn. 2007), as further support, however, the court in *Crawford* found that vessel status was implicated by the plaintiff himself because he alleged causes of action under the Public Vessels Act and the Suits in Admiralty Act, both of which the court noted require an initial finding, or at least an allegation, of vessel status, thereby negating the plaintiff's claim that he had no connection to a vessel in navigation.

II. *Stewart* did not upset or overrule the extensive jurisprudence concerning the construction of vessels recognized by the Fifth and Eleventh Circuits.

As argued previously, the jurisprudence of the Fifth Circuit concerning non-completed vessels has not been challenged by the Eleventh Circuit, and indeed remains on solid footing in the wake of *Stewart*.

First, *Stewart* dealt with an already completed structure (a dredge) that was being used for its intended purpose and was acting as an instrumentality of commerce. Indeed, the structure (later held to be a vessel) involved in *Stewart* had been a necessary participant in certain activities, moving from various locations to another to engage in its intended purpose as a dredge. *Stewart* did not address the issue of whether an incomplete structure not capable of performing its intended duties can be a vessel for Jones Act purposes.

Second, this Court in *Stewart* recognized that some structures once considered vessels can lose their vessel status if they have been withdrawn from the water (and hence navigation) for extended periods of time.[23] By the same logic, it stands to reason that, in order for a structure to lose its status as a vessel, it must first be considered a vessel, *i.e.*, it was actively engaged in its intended purpose and was subsequently withdrawn from that purpose.

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[23] *Stewart*, 543 U.S. at 496 (internal citations omitted).

That scenario never happened with the CAJUN EXPRESS: it never before had engaged in offshore drilling operations; and, as the record below reflects, and which petitioner admits, it could not perform the designed operations for which it was intended at the time of petitioner's alleged injury.

Finally, petitioner's argument that the CAJUN EXPRESS as of April 2001 (after petitioner's alleged injury) was capable of performing its intended purpose is of no moment when analyzing the status of the CAJUN EXPRESS at the time of petitioner's alleged injury. Petitioner was assigned to work aboard the CAJUN EXPRESS while it was still being built, a position petitioner admits he held for a significant period of time before April of 2001.

This Court in *Chandris, Inc. v. Latsis*[24], held that a change in a worker's duties or assignment must be contemplated when determining seaman status, both for the benefit of and detriment to a worker and employer:

> For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and

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[24] 515 U.S. 347 (1995)

> continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.[25]

The law is clear that any future work contemplated, whether by the employer or the plaintiff, is not to be considered when determining seaman status. As this Court later stated in *Harbor Tug and Barge Company v. Papai*[26], wherein it

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[25] *Chandris*, 515 U.S. at 372 (emphasis added).

[26] 520 U.S. 548, 556 (1997).

declined to predict seaman status under the Jones Act based on the possible seagoing yet sporadic nature of some of the duties plaintiff could have been hired to perform in the future, that where an employee is injured during a new work assignment, the employee's prior work history should not be considered when determining seaman status: "[T]he employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer."[27]

Here, the same result should follow: at the time of petitioner's alleged accident, his work assignment had changed from his previous employment as he was not working aboard a completed vessel "in navigation." Whether petitioner worked on the CAJUN EXPRESS after it was completed and put into commerce, or he was

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[27] See also *West v. Lamulle Construction Company, Inc.*, 1998 WL 151428, * 6 (E.D. La. 1998 J. Clement) (same, and citing *Papai*); *Sikorski v. Halliburton Energy Services, Inc.*, 2005 WL 1574443, * 3 (E.D. La. 2005 J. Lemmon) (employee cannot be "deemed a seaman because of his contemplated future work on that vessel."); *Nicole v. Southstar Industrial Contractors*, 2004 WL 936848, * 2 (E.D. La. 2004 J. Zainey) (future assignments from both the employee's and employer's perspective are entirely speculative; plaintiff "cannot rely upon mere future possibilities to create seaman status in the present."); *Smith v. Nicklos Drilling Company*, 841 F.2d 598 (5th Cir. 1988) ("The employee must be a seaman at the time his claim arises; the fact that he was once a seaman and that either he or his employer intends someday for him to again become one do not suffice to tint with blue water status all the events that happened in between, however remote in time and place from a vessel past or a vessel future.")

promised future work aboard it or some other vessel, has no bearing on his or the structure's status at the time of his alleged accident.

CONCLUSION

There is no square and direct conflict between the Fifth and Eleventh Circuit regarding the non-vessel status of structures still under construction and which have not been made an instrumentality of commerce and otherwise placed "in navigation." This Court's decision in *Stewart* did nothing to undermine the Fifth Circuit's long-standing line of jurisprudence regarding vessels still being constructed, as *Stewart* involved a completed vessel that clearly was being used in commerce for its intended purpose at the time of the accident.

For the foregoing reasons, Petitioner's Petition for Certiorari should be denied.

Respectfully submitted,

Hal C. Welch (La. Bar 13344)
Counsel of Record
Jason A. Schoenfeld (La. Bar 25242)
Lemle & Kelleher, L.L.P.
Pan-American Life Center
601 Poydras Street, 21st Floor
New Orleans, Louisiana 70130-6097
(504) 586-1241
Counsel for Respondents,
Transocean Offshore USA, Inc.,
and Sedco Forex Corp.